83-2044

No. ____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BEN CARTER,
Petitioner

v.

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION,
Respondent

SUPPLEMENTAL APPENDIX

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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT

OF GEORGIA

AUGUSTA DIVISION

BEN CARTER,	)	
	)	
Plaintiff	)	CIVIL ACTION
	)	
v.	)	NO. CV 178-113
	)	
SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION,	)	
	)	
Defendant	)	

O R D E R

Hopefully, this protracted litigation is before the Court for the final time. The Fifth Circuit has remanded the case with the direction to reconsider the issue of pendent jurisdiction. Having concluded that jurisdiction is proper, this Court must also address the Defendant's motion for judgment notwithstanding the verdict or, alternatively, for a new trial.

I. FACTS AND PROCEDURAL HISTORY

Ben Carter, a resident of Georgia, originally filed this action in the Superior Court of Richmond County, Georgia, in 1972 against the Sheet Metal Workers' International Association (hereinafter the International) and Local 85 of Augusta, Georgia. The complaint then and now basically alleged that the named defendants had conspired with others and intentionally engaged in outrageous conduct designed to interfere with Carter's employment opportunities and harm his reputation thereby causing him grievous mental and emotional distress. International responded by filing a motion to quash service and to dismiss the case for improper service. When the motion was denied, a default

judgment was entered against the International for failure to answer.

At this point, Carter made a tactical decision to dismiss Local 85 as a defendant and proceed solely against the International. A trial on the issue of damages followed. Upon entry of a final judgment, International appealed the denial of its motion to dismiss. The Georgia Supreme Court ultimately accepted the appeal, found that International had not been properly served and reversed the entry of a default judgment. See Sheet Metal Workers' International Association v. Carter, 241 Ga. 220, 244 S.E.2d 860 (1978).

Thereafter, Carter obtained proper service on International. The latter removed the case to this Court contending that a federal question was raised

by the allegations of the complaint. Specifically, International relied on the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401, 402, 411 (1976), the Labor Management Relations Act, 29 U.S.C. § 185 (1976) and, alternatively, 28 U.S.C. § 1337 (1976) as the basis for federal jurisdiction. There was no motion to remand the case to state court.

The case, however, proceeded to trial only upon an appended state tort claim for intentional infliction of emotional distress.[1] The evidence introduced at trial established that Carter became a journeyman member of the Union in January

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1 Neither the Court nor International considered a remand of the case to the state courts at this point.

of 1956. His employment from 1956 to 1965 consisted of a series of short-term jobs obtained with the assistance of the Union through a Local business agent. In 1965, Carter opened his own sheet metal shop in New Jersey, C & M Sheet Metal Company (hereinafter C & M), an unincorporated business. The shop remained open until February 9, 1968, when it had to close due to financial difficulties. Carter testified that his financial problems stemmed from an inability to collect accounts receivable and a lack of union cooperation. He alleged that Local 13 out of New Jersey refused to supply C & M with qualified workers and denied it access to an

apprentice.

After Carter closed C & M, he obtained work as an estimator, a nonunion position classified as a management position. He remained so employed until July 19, 1968. During his tenure as an estimator, however, Local 13 went on strike. This event led to Carter's first major conflict with the Union. Carter claimed that since he was employed in a nonunion position, it was not necessary for him to contribute to the strike fund. Local 13 felt otherwise, and on February 25, 1969, Carter was brought before Local 13's Executive Board, tried and found guilty of failing to contribute to the strike fund. He was fined

$1500 and notified of his right to appeal. Thereafter, Carter did appeal the fine, writing a letter to President Carlough of the International explaining his position. Having failed to receive a reply, Carter wrote follow-up letters to Carlough dated July 29, 1969 and November 12, 1969, requesting a ruling on the matter. On November 26, 1969, Carlough finally responded and reversed the finding of the Executive Board holding that contributions to the strike fund were voluntary and not mandatory. Carlough did admonish Carter for his refusal to contribute stating that each union member had a moral obligation to support the strike.

Carter's second major conflict with the Union revolved around his

November 23, 1970 request for a withdrawal card to be issued by Local 13. It is apparent that Carter had taken a management position and Union by-laws required that any member so employed must obtain a withdrawal card. Upon receiving the request, Jerome Schnall, Financial Secretary for Local 13, informed Carter that it must be heard by the Executive Board and that he would submit it to them. The Board responded by letter dated January 19, 1971, that it would need information concerning the type of work Carter was performing before it could rule on his request. A letter from Carter to Schnall dated January 23, however, indicated that in a telephone conversation between those two on January 18th, Schnall stated

that the Board was really concerned about unpaid obligations Carter owed to Local 13 which he had accrued while operating C & M.[2] Carter denied that he owed any money. Subsequently, having failed to receive a ruling on the matter, Carter wrote follow-up letters to Local 13 dated February 6, 1971, February 22, 1971, and March 15, 1971, requesting expedition of action on his request.

Local 13, apparently in a quandary over how to solve the problem, contacted the International in April of 1971 and requested advice as to what its position should be, given

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[2] Local 13 claimed that Carter owed the Vacation Pay account $1,500 and the Welfare and Pension account $1,080 on behalf of three local 13 members that he had employed at C & M.

the existence of the debt.[3] David Turner, General Secretary-Treasurer of the International, in investigating the matter asked Carter to explain why the debt was not paid (despite the fact that Carter had denied owing the money in an earlier letter to Turner). Thereafter, on June 10, 1971, Turner again wrote Carter this time to inform him that the investigation was complete and that he was instructing Local 13 to issue the card if all of the Constitutional prerequisites were met. Turner again expressed concern over Carter's failure to pay the alleged indebtedness despite Carter's earlier denials. The

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[3]The correspondence forwarded to International stated that Local 13 had copies of numerous communications sent to Carter over the past two and one half years requesting payment of the debt. Interestingly, Carter denied ever receiving said communications and one was introduced at trial.

withdrawal card was issued on June 11, 1971.

The final conflict between Carter and the Union commenced with Carter's January 21, 1972 request that Local 13 issue to him a reinstatement card and transfer his membership to a Local in Georgia.[4] It appears that Carter had moved to Georgia in December of 1971 and desired the reinstatement card so that he could pursue his livelihood there. On February 8, 1972, Carter was informed that the Executive Board of Local 13 was taking his request "under advisement." Receiving no further response, Carter wrote the International and requested assistance in

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[4]The acts for which Carter seeks damages were primarily those that occurred between January and March of 1972. The failure to issue the reinstatement card was part of the continuing wrong complained of that ended when the request was granted in 1978.

resolving the conflict. Lonnie Gaither, the Assistant to the General President, replied that an investigation revealed Carter owed Local 13 a sum of money and that if he was serious about resolving the dispute he should meet with Local 13 and attempt to reach an agreement. At all times, Carter denied the existence of this debt.

Contemporaneous with the request for a reinstatement card, Carter had succeeded in obtaining employment as a sheet metal worker in Georgia. E. J. Lancaster, President of Metal Crafts, Inc., testified that in February of 1972 his company had employed Carter for a brief period of time. The reason this employment ended was made clear by Mr. Rahn, Lancaster's foreman. Rahn testified that as part of his job he was to submit the names of all new employees to the appropriate Local for

"clearance." When Carter's name was submitted to Local 85, it was determined that he was not cleared for work as a sheet metal employee. Upon learning that he was not cleared, Carter agreed not to work pending a satisfactory resolution of the problem. Mr. Lancaster fully agreed with this procedure and in fact desired that the situation be handled in that way. The appropriate clearance never came.

In December of 1972, having not received the reinstatement and transfer card and unable to obtain work in the sheet metal trade, Carter brought the instant suit against the International and Local 85. Six years later, while the case was on the last leg of its sojourn through the Georgia court system, Carter again requested a

reinstatement card and a transfer.[5] This time Local 13 complied with the request, albeit over the strenuous objection of Robert Visconti, a member of Local 13's Executive Board since 1968.[6] Carter testified that during this six-year period in which he was denied the card, he was unable to obtain employment consistent with his trade despite the existence of Georgia "Right to Work" laws prohibiting an employer from requiring an employee to be a union

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[5]The decision by the Georgia Supreme Court reversing the default judgment was handed down on April 18, 1978. See Sheet Metal Workers' International Association v. Carter, 241 Ga. 220, 244 S.E.2d 860 (1978). The second request for a reinstatement card was made on January 9, 1978.

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[6]Visconti explained that the card was issued by an Executive Board composed of relatively new and inexperienced members having no personal involvement in the original dispute.

member as a condition of employment. See Ga. Code Ann. §§ 54-904, 905 (1974). He further testified that he had to accept lower wages and travel frequently in order to obtain employment. The overall effect of these disruptive events in his life caused Carter to experience humiliation and emotional distress; a result allegedly the natural consequence of the actions of International and the other "co-conspirators."

Upon consideration of the evidence, the jury deliberated and necessarily concluded that the International conspired with others to engage in conduct characterized as outrageous and designed to interfere with Carter's employment opportunities and damage his reputation thereby causing him severe emotional distress. In assessing damages, the jury awarded

Carter $35,000 in compensatory damages, $110,000 in punitive damages and $5,280 in attorney's fees. This Court entered final judgment in accordance with the jury's verdict on May 25, 1979.

International then moved for a judgment notwithstanding the verdict, or, alternatively, for a new trial. International also moved the Court to vacate the judgment and remand the case to the state courts on the basis of a lack of subject-matter jurisdiction due to the absence of a federal question or diversity of citizenship. This Court reluctantly agreed and issued an Order remanding the case to the state courts. Carter applied to the Fifth Circuit for an Order of Mandamus requiring this Court to vacate its Order of Remand.

The Fifth Circuit granted the application and held that this Court had

erroenously determined it lacked the power to hear the pendent state claims. The Court reasoned that the issue whether pendent jurisdiction exists must be answered by examining the complaint at the time the petition for removal was filed, not at the time the case proceeded to trial. In the case sub judice, sufficient federal questions under the Labor Acts had existed when the case was removed to this Court to which the state tort claim could have been appended. Accordingly, the Fifth Circuit remanded the case to this Court to consider whether in view of all the surrounding circumstances the state tort claim should be accepted under a discretionary exercise of pendent jurisdiction. See In re Carter, 618 F.2d 1093 (5th Cir. 1980), cert. denied, ___U.S.___, 101 S.Ct. 1410 (1981).

II. PENDENT JURISDICTION

The decision of a federal court to hear a pendent state claim involves two separate but related considerations. First, the court must decide whether it has the power to exercise pendent jurisdiction. Second, the court must decide whether in its discretion it should exercise pendent jurisdiction. See Jackson v. Stinchbomb, 635 F.2d 462, 463 (5th Cir. 1981) ("Having concluded that the district court did have the power to exercise pendent jurisdiction, we inquire next whether the exercise of pendent jurisdiction is an abuse of discretion."). In the case sub judice, the Fifth Circuit has determined that the power to exercise pendent jurisdiction exists. Thus, this Court must decide

whether pendent jurisdiction should be exercise.

The leading case on the doctrine of pendent jurisdiction is United Mine Workers v. Gibbs, 383 U.S. 715 (1966). In Gibbs, the Supreme Court enumerated some of the factors that a court must consider before deciding to exercise jurisdiction over a pendent state claim

> "[T]hat power need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them, . . .Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well. Similarly, if it appears that the state issues

> substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals. There may, on the other hand, be situations in which the state claim is so closely tied to questions of federal policy that the argument for exercise of pendent jurisdiction is particularly strong. In the present case, for example, the allowable scope of the state claim implicates the federal doctrine of pre-emption; while this interrelationship does not create statutory federal question jurisdiction,. . . its existence is relevant to the exercise of discretion."

Id. at 726-27.

A review of these factors in the context of this case reveals that some weigh against the exercise of pendent jurisdiction while others are clearly in favor of such an exercise. The fact that it became clear at the pretrial conference that the case would be proceeding solely on the state tort claim and that, therefore, this case would require decisions on state law alone weighs

against the exercise of pendent jurisdiction.[7] Other factors, however, are more than sufficient to counter-balance these negative indicia.

In this case, a Georgia worker has sought to impose liability on a labor union for the manner in which it denied him the right to work thereby causing severe emotional distress. The case thus involves an

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[7] It should be noted that in this case no federal claim was dismissed because none was pleaded. The International removed the case to this Court through an expansive reading of Carter's complaint. Nevertheless, the Supreme Court has held that dismissal is not necessarily mandated where the federal claims are eliminated:

> "We are not willing to defeat the commonsense policy of pendent jurisdiction -- the conservation of judicial energy and the avoidance of multiplicity of litigation -- by a conceptual approach that would require jurisdiction over the primary claim as a prerequisite to resolution of the pendent claim."

Rosado v. Wyman, 397 U.S. 397, 405 (1970).

area of the law subject to stringent federal regulations and raises serious pre-emption questions. Further, the case was not filed in this Court by Plaintiff but rather was removed hereby the Defendant. Even though it subsequently became clear that the case would involve only the state tort issue, the Defendant did not attempt to have the case remanded to the state courts until after the entry of a final judgment adverse to the International. The Court in Kerry Coal Co. v. United Mine Workers, 637 F.2d 957 (3d Cir. 1981) was faced with a similar situation wherein the defendant did not move for a dismissal of the state claim once the federal claims of individual plaintiffs were dismissed. In reviewing a motion for judgment notwithstanding the verdict, the Court noted:

> "Instead the individual defendants tambled on trying the state law claim to a federal jury and only long after the verdict raised the objection that it should have been dismissed in an amended motion for a judgment notwithstanding the verdict. In such circumstances we cannot say that refusing to grant a motion for judgment notwithstanding the verdict was error."

Id. at 965. As in Kerry Coal Co., International gambled on trying the state claim to a federal jury and lost. Finally, considerations of judicial economy and fairness to the litigants weigh strongly in favor of the exercise of pendent jurisdiction. This case has been in the state and federal court systems since 1972. It has been twice adjudicated and appealed. It is now time to end the litigation. Accordingly, on the basis of these factors, it is the conclusion of this Court that pendent jurisdiction over the state claim should be exercised.

III. JUDGMENT NOTWITHSTANDING THE VERDICT

International has moved for a judgment notwithstanding the verdict on four separate grounds. It alleges that there was insufficient evidence introduced at trial to permit the jury to conclude that International participated in a conspiracy to cause Carter severe emotional distress. It further alleges that the state tort claim is pre-empted, that the suit is barred by the applicable Georgia statute of limitations and that the Court lacks subject-matter jurisdiction.

International's claims that the state cause of action is pre-empted and that the suit is barred by a state statute of limitations were previously discussed by this Court in an Order overruling International's motion to dismiss. No sufficient

reason has been offered to disturb that ruling.[8] Also, the issue of subject-matter jurisdiction has been affirmatively decided in the preceding section of this Order. The only ground remaining to be adjudicated, therefore, is whether the

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[8]"The federal doctrine of the law of the case applies to principles of law articulated by both the district courts and the appellate courts. As Professor Moore explains:

> When . . . a federal court enunciates a rule of law to be applied in the case at bar it not only establishes a precedent for subsequent cases under the doctrine of stare decisis, but as a general proposition, it establishes the law, which other courts owing obedience to it must, and which it itself will, normally apply to the same issues in subsequent proceedings in that case. 1B Moore's Federal Practice par. 0.404[1] at 402-03 (2d ed. 1974)."

Evans v. Buchanan, 465 F.Supp. 445, 448 (D.Del. 1979). See also Pettway v. American Cast Iron Pipe Co. 576 F.2d 1157, 1189-90 (5th Cir. 1978), cert. denied, 439 U.S. 1115 (1979).

evidence was sufficient to permit Carter to recover.

The standard for reviewing a motion for judgment notwithstanding the verdict based on the sufficiency of the evidence was enunciated by the Fifth Circuit in Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969) (en banc):

> "On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence -- not just that evidence which supports the non-mover's case -- but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury.

> A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment n.o.v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses."

Id. at 374-75. It is also the law of the Eleventh Circuit. See Bonner v. City of of Prichard, Alabama, 661 F.2d 1206, 1207 (11th Cir. 1981).

In this case, to establish a cause of action Carter was required to prove:

> "[B] clear and convincing evidence that the Defendant International Union entered into a conspiracy with some other person or persons that intentionally engaged in outrageous conduct and words which damaged Cater's reputation among prospective employers, subjecting him to embarrassment, scorn, and derision from his friends, associates, relatives

> and fellow-employees, thereby causing him grievous mental and emotional distress."

Transcript, Volume II at 52-53 (Court's charge to the jury).

International first contends that there was not the slightest evidence introduced at trial that tended to show that a conspiracy existed between itself and anyone to commit the tort of outrageous conduct. In evaluation this contention, it should be noted that a "[c]ivil conspiracy is an act which is by its very nature covert and clandestine, and usually not susceptible of proof by direct evidence. Concert of action, amounting to conspiracy, may be shown by circumstantial as well as direct evidence." Prescott v. Carithers, 158 Ga. App. 366, 367, 280 S.E.2d 361 (1981) (citations omitted).

Further:

> "to show conspiracy it is not necessary to prove an express compact or agreement among the parties thereto. The esstential element of the charge is the common design; but it need not appear that the parties met together either formally or informally and entered into any agreement, nor is it essential that it should appear that either by words or writing they formulated their unlawful objects. It is sufficient that two or more persons in any manner either positively or tacitly came to a mutual understanding that they will accomplish the unlawful design."

Cook v. Robinson, 216 Ga. 328, 329-30, 116 S.E.2d 742 (1960) (quoting Woodruff v. Hughes, 2 Ga. App. 361, 365, 58 S.E. 551 (1907). Accord Blackstone Industries, Inc. v. Andre, 232 Ga. 715, 208 S.E.2d 815 (1974).

In viewing the evidence as a whole, and allowing all reasonable inferences, it is apparent to this Court that the jury was justified in concluding that International participated in a

conspiracy to engage in outrageous conduct intended to cause Carter severe emotional distress. It is not true, as contended by International, that it was merely a passive observer of the conflict between Carter and the Locals. International advised Local 13 of the proper course of action with respect to the request for reinstatement and, perhaps most importantly, helped to delay resolution of the latter request by insisting that Carter work out the problem with the Local despite his insistence that he did not owe the money claimed by Local 13. It was obvious that the Local was not going to budge from its position that the debt was owed thereby leaving Carter with no alternative but either to comply with the demand for money or go elsewhere.

Further, the delays by both Local 13 and the International in resolving Carter's various requests and appeals, the existence of communication between International and Local 13 and the apparent dislike of Carter by the Union leadership[9] lead this Court to conclude that a reasonable jury could have inferred that a "mutual understanding" existed whereby the conspirators would act to restrain the employment and union activities of Carter. The natural consequence of this restraint was the infliction of

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[9]The Union's dislike of Carter can be inferred from the testimony of Robert Visconti, from the constant delays in the handling of requests and from the various admonishments by the International for what it perceived to be improper actions by a union member in failing to pay into a voluntary strike fund and failing to pay an alleged debt.

severe emotional distress upon Carter.

International next asserts that even if a conspiracy was found to exist, the actions of the Locals and the International did not amount to outrageous conduct. The Supreme Court has defined outrageous conduct as "conduct on the part of union officers that 'no reasonable man in a civilized society should be expected to endure it.'" Farmer v. United Brotherhood of Carpenters and Joiners of America, 430 U.S. 290, 302, 51 L.Ed.2d 338, 351 (1977). This prohibited conduct, it should be noted, can be other than the recitation of foul-language, insults and threats of physical violence (verbal abuse) to which the Defendant would like this tort limited. "The extreme and outrageous

nature of the conduct may arise not so much from what is done as from abuse by the defendant of some relation or position which give him actual or apparent power to damage the plaintiff's interests." W. Prosser, Law of Torts, § 12 at 56 (4th ed. 1971) (emphasis added).

Again, in viewing the evidence as a whole and allowing all reasonable inferences, it is apparent that the jury was justified in concluding that the International, in concert with others, engaged in conduct properly characterized as outrageous. These conspirators consistently denied Carter prompt resolution of his requests for a withdrawal card and a reinstatement card[10] contending that he owed Local 13 money

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[10]Both cards were subsequently authorized and issued.

from a failure to contribute to the Vacation and Pension and Welfare accounts of workers in his employ at C & M. This indebtedness, however, was only brought to Carter's attention when he requested some action from the Union. The Union neither instituted suit nor sent any communication to Carter documenting the basis for this debt.[11] Thus, the jury could reasonably infer that the Union was merely using this alleged debt as a pretext to deny Carter's requests. Further, there was evidence from which the jury could reasonably infer that the Union actively sought to restrict

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[11] Although a letter from Visconti to Turner dated April 9, 1971, alleged the existence "of numerous communications requesting payment" of this debt, none was introduced at trial. See Plaintiff's Exhibit 20. The jury, therefore, was authorized to conclude that Carter's testimony that he was not previously informed of the debt was credible.

Carter's employment opportunities in Georgia by not reinstating him in 1972 and then denying him clearance for union jobs despite the fact that Georgia has "Right to Work" laws prohibiting such conduct.[12] The natural consequence of these actions was to cause Carter humiliation among his friends and his family by reducing his ability to earn wages consistent with his talents. Therefore, the overall effect of the evidence justified the jury's conclusion that the International and the Locals were engaged in an insidious campaign to restrict Ben Carter's employment opportunities, thereby causing him emotion distress and eliminating him from the rosters of active and withdrawn

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[12] Ga. Code. Ann. §§ 54-904, 905 (1974).

union members. Such actions by a union purportedly organized to protect the rights of workers certainly rises to the level of conduct that can be characterized as outrageous. Accordingly, the motion for judgment notwithstanding the verdict should be, and is, DENIED.

IV. NEW TRIAL

International alternatively moves this Court for an Order granting a new trial on the merits should a judgment notwithstanding the verdict be denied. A number of grounds have been urged in support of the motion. First, it is argued that the evidence was insufficient to support liability. Second, International argues that the verdict as to general damages was punitive in character, contrary to the Court's ruling and excessive. Third, it is

argued that punitive damages were not recoverable in this case. and that in any event the award was excessive. Fourth, it is argued that the Court erred in various aspects of its charge to the jury. Fifth, International contends that a new trial is mandated because of an improper closing argument by the Counsel for the Plaintiff. Finally, it is urged that an award of attorney's fees was unwarranted and contrary to law.[13]

1. Sufficiency of the Evidence

This Court has already concluded in the preceding section of this Order that

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[13] International further asserted that a new trial is mandated because the tort claim was barred by the applicable Georgia statute of limitation. As with the motion for a judgment notwithstanding the verdict, this Court finds it unnecessary to reconsider the issue given its prior disposition in a motion to dismiss. See note 8 supra and accompanying text.

the evidence was sufficient to sustain the verdict against a motion for judgment notwithstanding the verdict. Despite the existence of a more lenient standard in deciding whether to grant a motion for new trial,[14] a like conclusion is warranted here.

The standard to be used in reviewing a jury verdict on a new trial motion was outlined by the Court in Conway v. Chemical Leaman Tank Lines, Inc., 610 F.2d 360 (5th Cir. 1980):

> "[N]ew trials should not be granted on evidentiary grounds unless, at a minimum, the verdict is against the great -- not merely the greater -- weight of the evidence . . . . Factors

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[14] "There are circumstances where a district judge might rationally deny the motions for directed verdict and judgment notwithstanding the verdict, but grant the motion for new trial." URTI v. Transport Commercial Corp., 479 F.2d 766, 769 (5th Cir. 1973).

> militating against new trials in such cases are simplicity of the issues, the degree to which the evidence was in dispute, and the absence of any pernicious or undesireable occurrences at trial."

Id. at 363 (citations omitted). Without recounting the previous legal and factual discussions, but measuring the evidence by the standard enunciated in Conway, it is the conclusion of this Court that the evidence amply supports the verdict.

2. Punitive Damages[15]

International attacks the award of punitive damages on three grounds. First,

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[15] The term "punitive damages" has been held to have no place in recoveries under Georgia law. The usage of the term 'punitive damages' is a misnomer. There are no provisions for punitive damages in our Code. The damages referred to, if recoverable, are those authorized by Code Ann. § 105-2002." Griffin v. Whitfield, 143 Ga. App. 485, 487, 238 S.E.2d 589 (1977). Nevertheless, for ease of application, in this Order this Court will continue to refer to damages designed to deter wrongdoers as punitive.

it is argued that the Supreme Court's holding in International Brotherhood of Electrical Workers v. Faust, 442 U.S. 42, 60 L.Ed.2d 698 (1979) precludes any recovery of punitive damages from a labor union. Second, International argues that the recovery of punitive damages in this case amount to an impermissible double recovery in violation of Ga. Code Ann. § 105-2003. Finally, International argues that an award of $110,000 was excessive.

a. International Brotherhood of Electrical Workers v. Faust

In Faust, an employee sued his union for breach of the duty of fair representation in failing to process his grievance properly. Id. at 43, 60 L.Ed.2d at 701. The Supreme Court, after recognizing that it had the implied power to determine the scope of

available remedies in cases of this nature, held that punitive damages "may not be assessed against a union that breached its duty of fair representation . . . ." Id. at 52, 60 L.Ed.2d 707. The issue before this Court is whether Faust created a blanket prohibition against an award of punitive damages in all cases where a union is the defendant.

The statements of policy by the Court in Faust support the proposition that a blanket prohibition against the award of punitive damages was intended:

> "This limitation on union liability thus reflects an attempt to afford individual employees redress for injuries caused by union misconduct without compromising the collective interest of union members in protecting limited funds. To permit punitive damages, which, by definition, provide monetary relief, 'in excess of. . . actual loss,' . . . cound undermine this careful accomodation. Because juries are accorded broad discretion both as to the imposition and

> amount of punitive damages, . . . the impact of these windfall recoveries is unpredictable and potentially substantial . . . . Such awards could deplete union treasuries, thereby impairing the effectiveness of union as collective-bargaining agents. Inflicting this risk on employees, whose welfare depends on the strength of their unions, is simply too great a price for whatever deterrent effect punitive damages may have . . . . "

* * *

> "14. Moreover, it cannot be ignored that punitive damages may be employed to punish unpopular defendants. As we observed in the defamation context: '[Since] juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm cause, . . . they remain free to use their discretion selectively to punish expressions of unpopular views. Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger . . . . . Community hostility towards unions, management, or minority views can thus find expression in punitive awards . . . . '"

Id. at 50-51, 60 L.Ed.2d at 706 (citations omitted). At this point there is a

temptation to conclude that the Supreme Court created a blanket prohibition against the award of punitive damages in a labor dispute where a labor union is the defendant.

Subsequent cases, however, have concluded that the prohibition against the award of punitive damages expressed in Faust should be limited to suits based on a union's breach of its duty of fair representation. For example, in Bise v. International Brotherhood of Electrical Workers, 618 F.2d 1299 (9th Cir. 1979) the Ninth Circuit distinguished Faust and held that punitive damages could be awarded in suits brought under the Landrum-Griffin Act. Id. at 1305 n.6. See also Parker v. Local Union No. 1466, United Steelworkers of America, AFL-CIO, 642 F.2d 104, 107 (5th Cir. 1981). Further, in a case nearly on point, the Sixth Circuit also distinguished Faust and held:

> "We need not address McGraw's present viability. The reason is that the

> underlying conduct complained of was an assault and battery under Ohio law. Punitive damages are clearly available under this pendent state claim which is coextensive with the § 101 claim."

Shimman v. Frank, 625 F.2d 80, 101 (6th Cir. 1980) (emphasis added). This Court accepts the reasoning of the circuit courts and finds that Faust should be limited to cases wherein liability is premised on a breach of the duty of fair representation. Since liability in the case sub judice, as in Shimman, was based on a pendent state claim, it follows that where the state courts would permit a recovery of punitive damages, this Court is Erie bound to follow. Erie Railroad v. Thompkins, 304 U.S. 64 (1938).

b. Double Recovery

International argues that imposing punitive damages in addition to compensatory damages for grievous emotional distress amounts to an impermissible double recovery

under Georgia Code Sections 105-2002 and 105-2003. These sections, which govern the award of damages for aggravation and vindication respectively, provide:

> "In every tort there may be aggravating circimstances, either in the act or the intention, and in that event the jury may give additional damages, either to deter the wrongdoer from repeating the trespass or as compensation for the wounded feelings of the plaintiff."

Ga. Code Ann. § 105-1002 (1968).

> "In some torts the entire injury is to the peace, happiness, or feelings of the plaintiff; in such cases no measure of damages can be prescribed, except the enlightened conscience of impartial jurors. The worldly circumstances of the parties, the amount of bad faith in the transaction, and all the attendant facts should be weighed."

Ga. Code Ann. § 105-2003 (1968).

In the case sub judice, Carter complained in essence that the manner of interference by International and others in his employment opportunuties amounted to outrageous conduct entitling him to recover for the resulting

severe emotional distress. There was no testimony that he suffered an accompanying physical illness. Besides, there could not be any compensation based on a loss of wages since that recovery would be prohibited by the pre-emption doctrine. See Farmer v. United Brotherhood of Carpenters and Joiners of America, 430 U.S. 290, 51 L.Ed.2d 338 (1977). Thus, the compensatory damages were necessarily predicated solely upon Carter's mental anguish and, therefore, were only recoverable under Code Section 105-2003.

The Georgia Supreme Court in Westview Cemetery, Inc. v. Blanchard, 234 Ga. 540, 216 S.E.2d 776 (1975) discussed the extent to which recover is permitted under Code Sections 105-2002 and 105-2003 for injuries solely to the "peace, happiness or feelings of the plaintiff":

> "In summary, § 105-2203 prescribes a special measure of recovery for a cause of action which was disfavored at common law. That measure permits the jury to consider both circumstances relevant to compensation for the extent of the injury and circumstances relevant to deterrence of the wrongdoer. Having considered all these circumstances, 'the enlightened conscience of impartial jurors' should arrive at a verdict sufficient to both compensate and deter. Any additional recover under § 105-2202 would be a double recovery."

Id. at 546 (emphasis added).

At first glance, it would appear that Carter, having recovered both compensatory damages (necessarily under § 105-2003) and punitive damages (generally under § 105-2002, see footnote 15, supra) received an impermissible double recovery. A close examination of the jury charge in this case, however, reveals otherwise:

> "And again, under Georgia Law, I charge you that in every tort there may be aggravating circumstances, either in the act or the intention. And in that event, the jury may give additional damages to deter the wrongdoer from repeating the wrong.

"Compensatory or actual damages are allowed and should be awarded if Plaintiff, Ben Carter, has satisfied the jury from the evidence that he has been injured or damaged by way of damages to his reputation or that he has suffered embarrassment, scorn, and derision from his friends, associates, relatives, and fellow-employees as a proximate result of an illegal or wrongful act on the part of the International.

"Punitive or exemplary damages may be awarded in the sound discretion of the jury in the event that Carter reasonably satisfies the jury that he has been willfully or wantonly injured or damages by the International Union.

"With respect to actual or compensatory damages, since he is seeking damages only for mental suffering, I charge you that the measure of damages for any such injury is the enlightened conscience of an impartial jury seeking to do justice between the parties.

"Now, with respect to punitive damages, the purpose of awarding such damages is to allow a recovery to a Plaintiff like Mr. Carter by way of punishment to the Defendant International and for the added purpose of protecting the public by deterring the International and others from doing such wrong in the future."

Transcript, Volume II at 49-50. As provided in Blanchard, the damages recoverable under

Code Section 105-2203 includes both an element of compensation and an element of deterrence. The overall effect of the jury charge herein allowed no more. Although the award of damages was divided into compensatory and punitive labels, the compensatory damage award contained no allowance for deterrence and the punitive damage award contained no allowance for compensation. Thus, the overall award (exclusive of attorney's fees) was that amount the jury found was sufficient both to compensate and to deter. This being the exact measure of damages permitted under Code Section 105-2003, there was no impermissible double recovery.

c. Excessiveness

In light of the conclusion in the preceding subsection that the award of separate damages to compensate and to deter was in

effect a single award under Code Section 105-2003, International's contention that the award of punitive damages was excessive must be combined with its contention that the award of compensatory damages was excessive. International basically argues that the award was so excessive that it evinces passion and prejudice by the jury against the Defendant and, therefore, a remittitur or a new trial is mandated.

"Federal trial courts may, in their discretion, set aside a jury verdict and order a new trial if the amount of the verdict is excessive or inadequate." Lucas v. American Manufacturing Co., 630 F.2d 291, 293 (5th Cir. 1980). The Fifth Circuit in King v. Ford Motor Co., 597 F.2d 436 (5th Cir. 1979) discussed the situations in which a verdict can be set aside as excessive:

> "Before we will set aside the verdict we must see that the verdict has been

> reached on account of bias, passion, prejudice, corruption, or other improper motive or cause . . . [or] the damages allowed are so excessive as to warrant the belief that the jury must have been misled by some mistaken view of the merits of the case. . . ."

Id. at 445 (quoting Vest v. Gay, 275 Ala. 286, 154 So.2d 297 (1963). In a particularly appropriate comment, the trial court in Murray v. Beloit Power Systems, 79 F.R.D. 590 (D. Virgin Islands 1978) elaborated on the standard.

> "It is not enough that the Court, as trier of fact, would have awarded a lesser amount of damages. Rather, the damages assessed by the jury must be so unreasonable as to offend the conscience of the Court . . . . A trial judge must be extremely reluctant to interfere with the power of a jury to assess damages and a verdict will not be set aside unless it is clear to the court that the decision of the jury was the product of passion, prejudice or otherwise irrational behavior."

Id. at 592.

In the case sub judice, it has been held that the jury was justified in concluding that the International participated in a conspiracy

to engage in conduct properly characterized as outrageous that caused Carter severe emotional distress. In assessing damages, the jury was authorized both to compensate Carter for his injuries and to deter International from future conduct of the same type. See Ga. Code Ann. § 105-2003 (1968). In light of these factors, and in viewing the evidence as a whole, this Court cannot conclude that an award of $145,000 evinces a jury affected by passion, prejudice or bias.[16] The conduct of the International is particularly reprehensible in view of the fact that as an organization purportedly dedicated to protect the

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[16] Code Section 105-2003 permits the jury to consider the "worldly circumstances" of the defendant. International has a membership of 150,000 workers. Thus, the award breaks down to a cost of less than one dollar per member.

rights of workers, in this case it infringed on those same rights in a manner characterized as outrageous. Accordingly, the award should be, and is, upheld as not excessive.

3. Jury Charge

International argues that this Court erred in charging the jury pursuant to Georgia Code Sections 54-904 and 54-905.[17] These sections comprise a portion of the Georgia "Right to Work" laws and provide:

> "Any provision is a contract between an employer and a labor organization which requires as a condition of employment, or of continuance of employment, that any individual be or remain a member or an affiliate of a labor organization, or that any individual pay any fee, assessment, or other sum of money whatsoever, to a labor organization, is hereby declared to be contrary to the public policy of this State, and any such provision in any such

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[17] International further argues that it was error to charge Georgia Code Section 54-801. As this Court clearly explained at the trial, this section was not charged.

> contract heretofore or hereafter made shall be absolutely void."

Ga. Code Ann. § 54-904 (1974).

> "It shall be unlawful for any employer to contract with any labor organization, and for any labor organization to contract with any employer, so as to make it a condition of employment of any individual, or of continuance of such employment, that such individual be or remain a member of a labor organization, or othat such individual pay any fee, assessment, or other sum of money whatsoever, to a labor organization."

Ga. Code Ann. § 54-905 (1974).

International objects to this Court's decision to charge the above sections in the case sub judice arguing that in order to maintain a nonpre-empted state tort action, the law prohibits jurors from considering the fact of interference with employment opportunities on account of membership or nonmembership in a labor organization. See Farmer v. United Brotherhood of Carpenters and Joiners of America, supra.

It is clear to this Court, however, that while the fact of employment discrimination and the resulting loss of wages may not be considered in assessing liability and computing damages, the manner of the discrimination may be considered by the jury in deciding whether the Union engaged in outrageous conduct intended to inflict severe emotional distress upon the victim. See id. at 304-05. Thus, the jury should have been informed that the Georgia law prohibited the alleged conduct of Local 85 and the International and that these same parties nevertheless chose to ignore the law. The evidence therefore tends to show the outrageousness of the conduct by the conspirators.

International further argues that the charge concerning the extent to which the alleged employment interference was evidence of liability or damages was contrary to the

weight of the evidence and confusing and contradictory. The charge as given reads:

> "Employment discrimination -- that is, attempts to prevent Carter from obtaining employment from Union employers or attempts to have Carter removed from jobs with Union employers -- is not to be considered by the jury except insofar as such conduct, if any, constitutes malicious, outrageous conduct on the part of the Union.
> "You should not consider or attempt to resolve whether the International discriminated or attempted to discriminate against Carter with respect to employment opportunities with Union employers in connection with reaching your decision as to whether the International is liable to Carter for damages or as to the amount of damages Carter is entitled to, if any, unless you were to find that the manner in which such discrimination, if any was attempted or effected, was so malicious and outrageous that no reasonable man in a civilized society should be expected to endure it.
> "The loss of income -- in other words, any lostearnings -- if any, suffered by Carter as a consequence of refusals by Local 85 to refer or clear Carter for employment or attempts by Local 85 to have Carter removed from jobs with Union employers must be disregarded in determining whether the International Union is liable to Carter. In other words, any loss of earnings is not a part of what Mr. Carter is suing for

> in this case, and you will give them no consideration whatever."

Transcript, Volume II at 44-45. As this Court concluded at the charge conference, the above charge is supported by the evidence, understandable and entirely consistent with the mandate of the Supreme Court in Farmer.[18] See Transcript, Volume I at 278-92. Thus, the jury was correctly charged as to the extent interference with

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[18] "In view of the potential for interference with the federal scheme of regulation, the trial court should be sensitive to the need to minimize the jury's exposure to evidence of employment discrimination in cases of this sort. Where evidence of discrimination is necessary to establish the context in which the state claim arose, the trial court should instruct the jury that the fact of employment discrimination (as distinguished from attendant tortious conduct under state law) should not enter into the determination of liability or damages."

Farmer v. United Brotherhood of Carpenters and Joiners of America, supra, at 305 n.13, 51 L.Ed. 2d at 353 n.13 (emphasis added).

employment was evidence of liability or damages in this case.

4. Closing Argument

International contends that the closing argument by Counsel for the Plaintiff was improper for the following reasons. First, Counsel improperly argues matters pertaining to employment discrimination and contended that the International knew Carter would be unable to obtain proper employment in Georgia. Second, Counsel improperly placed the burden of proving the $2,580 debt on International. Finally, Counsel improperly informed the jury that any sum awarded as punitive damages would be subject to taxation and therefore a greater sum should be awarded.[19]

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[19] Although this Court could dismiss International's objections to the closing arguments of Carter's counsel due to its failure to voice the objections at the proper time, they will be disposed of on the merits. See Milos v. Sea-Land Service, Inc., 478 F.Supp. 1019, 1021 (S.D. N.Y. 1979), aff'd, 622 F.2d 574 (2d Cir.), cert. denied, 449 U.S. 954 (1980) (objection should be made at trial).

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International's contention that Counsel's argument respecting the Georgia "Right to Work" laws was prejudicial is simply without merit. As stated in the preceding section of this Order, Carter was not seeking damages for the fact of employment interference but rather for the emotional distress caused by the outrageous mannerin which the interference was attempted. The fact that the International and Local 85 chose to ignore Georgia law was evidence of the outrageous nature of their conduct. Accordingly, Counsel was permitted to assert that International's conduct violated Georgia law.

International's argument that the burden of proof with respect to the debt should properly be upon the plaintiff is also without merit. International and Local 13 consistently used this alleged debt as justification for their initial denials of Carter's requests for

a reinstatement card and for a withdrawal card. Thus, the exitence of the debt is in the nature of an affirmative defense which must be pled and proven by the defendant. See Fed. R. Civ. P. 8(c). Counsel's argument questioning the sufficiency of the evidence introduced to establish the exitence of the debt (and therefore the claim of acting in good faith) was proper.

International's final argument that Carter's counsel improperly informed the jury that any punitive damage award would be subject to taxation might have been grounds for a new trial had this Court not immediately castigated Counsel for his remakrs and instructed the jury to completely disregard the statement. The Court in Porss v. Maritime Overseas Corp., 531 F.2d 667 (2d Cir. 1976) held

that a new trial based on the misconduct of counsel was not mandated where "the jury was promptly directed to disregard any improper comments made in front of them." Id. at 669. In this case, it is clear to the Court that the jury was not prejudiced by the improper reference to the taxability of punitive damages.

5. Attorney's Fees

International argues that under the facts of this case, the award of attorney's fees was entirely inappropriate. This Court, however, reaches an opposite conclusion.

Attorney's fees can be awarded under Georgia law only where the facts of the case fall within the confines of Code Section 20-1404, which provides:

> "The expenses of litigation are not generally allowed as a part of the damages; but if the defendant has acted in bad faith, or has been stubbornly litigious, or has caused

> the plaintiff unnecessary trouble and expense, the jury may allow them."

Ga. Code Ann. § 20-1404 (1977). Of course, "[i]t is only necessary for the plaintiff to show that one of the three conditions required by the statute exists." Franchise Enterprises, Inc. v. Ridgeway, 157 Ga. App. 458, 460, 278 S.E.2d 33 (1981). The only condition reasonably open to the plaintiff in this case is whether the defendant acted in bad faith.

The type of bad faith permitting a recovery of attorney's fees contemplated by the statute refers to the actions of the defendant which form the underlying basis for the complaint, not the defendant's actions in defending the suit. See Southern Bell Telephone & Telegraph Co. v. C & S Realty Co., 141 Ga. App. 216, 233 S.E.2d 9 (1977). The Georgia courts have concluded that where an

intentional tort is the basis for the complaint, a plaintiff is generally permitted to submit the issue of attorney's fees to the jury. "The wilful violation of the rights of another involves the species of bad faith that entitles the person wronged to recover the expense of litigation including attorney fees." Spier v. Williams, 146 Ga. App. 880, 881, 247 S.E.2d 549 (1978). See also General Refractories Co. v. Rogers, 240 Ga. 228, 235, 239 S.E.2d 795 (1977) ("Having held the plaintiff did not prove an intentional tort the element of bad faith is eliminated from further consideration in passing on attorney fees.") Dodd v. Slater, 101 Ga. App. 358, 360, 114 S.E.2d 167 (1960) ("The wilful violation of the rights of another, every intentional tort, invokes the species of bad faith that under the provisions of Code § 20-1404 entitles the

person wronged to recover the expense of litigation invoking attorney's fees.").

In the case sub judice, the complaint alleged and the jury was authorized to find that the International, through outrageous conduct, intentionally caused Carter severe emotional distress. Accordingly, the jury was justified in awarding attorney's fees under Code Section 20-1404.

V. CONCLUSION

It is the conclusion of this Court that it should exercise jurisdiction over the pendent state tort claim comprising the sole basis for this action. It follows, therefore, that the prior Order of this Court remanding the case to the Superior Court of Richmond County, Georgia, should be, and is hereby, VACATED.

Further, it is the conclusion of the Court that International's motion for judgment

notwithstanding the verdict or, alternatively, for a new trial is without merit. Accordingly, the motion is DENIED.

SO ORDERED, this 18th day of March, 198

/s/ Anthony A. Alaimo
CHIEF JUDGE, UNITED STATES DISTRIC
COURT, SOUTHERN DISTRICT OF GEORGI

In re Ben CARTER, Petitioner.

No. 80-7010

Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

May 30, 1980.

After entry of final judgment, a remand order was issued by the United States District Court for the Southern District of Georgia at Augusta, Anthony A. Alaimo, Chief Judge. On petition for writ of mandamus and/or prohibition, the Court of Appeals, Fay and Randall, Circuit Judges, held that: (1) such remand order could not have been issued under authority of statute providing grounds for remand and thus review of that order by writ of mandamus was not precluded by that statute providing, with exception, that remand order was not reviewable on appeal or otherwise, and thus order of remand issued on what-

ever grounds by district court after entry of final judgment is reviewable in Court of Appeals through petition for writ of mandamus; (2) whether subject matter jurisdiction exists is question answered by looking to complaint as it existed at time petition for removal was filed; (3) when subsequent narrowing of issues excludes all federal claims, question whether pendent state claim should be remanded is question of judicial discretion, not of subject matter jurisdiction; and (4) complaint allegations were sufficient to state substantial federal claim under Labor-Management Reporting and Disclosure Act and to confer federal question jurisdiction over breach of duty of fair representation claim.

Writ granted, and case returned with directions to vacate remand order.

Harris, McCracken, Pickett & Jackson, William R. McCracken, Augusta, Ga., for petitioner.

Anthony A. Alaimo, U. S. Dist. Judge, Brunswick, Ga., Donald W. Fisher, Toledo, Ohio, Jacobs, Jacobs & Davis, James T. Langford, Atlanta, Ga., Jack L. Cooper, Augusta, Ga., for district court.

On Petition for Writ of Mandamus and/or Prohibition to the United States District Court for the Southern District of Georgia.

Before AINSWORTH, FAY and RANDALL, Circuit Judges.

FAY and RANDALL, Circuit Judges:

In ruling on this petition for a writ of mandamus we must first answer the threshold question whether the bar to appellate review of a district court order remanding a case to a state court,

which is found in 28 U.S.C. § 1447(d), [1] applies to a remand order entered upon a ground specified in 28 U.S.C. § 1447(c)[2] but issued after entry of final judgment in the federal court. Finding that § 1447(d) is no bar to appellate review in this case, we also review the propriety of the remand order entered by the district court and, disagreeing with the district

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1 28 U.S.C. § 1447(d) (1976) provides: An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

2 28 U.S.C. § 1447(c) (1976) provides: If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

court's disposition of the case, we grant the writ.

I. Procedural History

Ben Carter, a resident of Georgia, originally filed this action in 1972, in a Georgia state court against the Sheet Metal Workers' International Association [the International] and Local 85 of that labor organization. The complaint charges the representatives and members of the two organizations with a conspiracy to deprive Carter of his employment, to deny him his union membership, and to impair his reputation. The Local answered the complaint while the International did not, filing instead a motion to quash service and to dismiss the complaint because of improper service. That motion was denied and, because no answer to the complaint had been filed,

a default judgment was entered against the International. Before trial, Carter dismissed the Local as a defendant, and therefore the state trial concerned only the issues of the amount of damages and attorney fees for which the International was liable to Carter. The jury found the following damages and fees: $22,089 actual damages; $30,000.00 punitive damages; and $9,300 attorney fees.

This judgment was ultimately reversed by the Georgia Supreme Court on the ground that the International was not validly served with process. Sheet Metal Workers' International Association v. Carter, 241 Ga. 220, 244 S.E.2d 860 (1978). The action was reinstituted and proper service on the International made, whereupon the International removed the case to the

federal court. The basis for removal as described in the International's Petition for Removal was that the general allegations of the complaint, particularly the assertions that "the defendants conspired together, maliciously and willfully, to deprive the plaintiff of his employment in the Sheet Metal Industry...[and] to deny plaintiff his right and privilege to be a member of defendants' union" appeared to allege claims arising under federal law. The International specifically mentioned three provisions of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401, 402, 411 (1976), and one provision of the Labor Management Relations Act, 29 U.S.C. § 185 (1976). Alternatively, the International argued that removal was proper because

the case came within the original jurisdiction of the district court pursuant to 28 U.S.C. § 1337 (1976).

The general allegations of the complaint asserted that the International and the Local had engaged in conduct that arguably might have formed the foundation of a federal cause of action. Understandably, however, Carter's Georgia pleading cited no federal statute and does not unambiguously raise a claim under federal law. Carter did not move to have the case remanded, and the court did not remand on its own motion. At a pretrial conference, Carter made it clear that he intended to press only a state-created tort claim. The federal court did not then remand the action. After trial, the jury returned a verdict in favor of Carter in the following amounts: $35,000 actual

damages; $110,000 punitive damages; and $5,280 attorney fees. In accordance with the jury verdict, the district court entered a final judgment in the case on May 25, 1979.

After entry of final judgment the International, which had initially sought removal, moved to have the judgment vacated and the case remanded for lack of subject matter jurisdiction. Upon examining the question of jurisdiction, the district court regretfully concluded that it had not had jurisdiction to hear the case, vacated the judgment, and remanded the case to the Superior Court of Richmond County, Georgia. Carter then filed this petition for a Writ of Mandamus with this court seeking review of the remand order. Well aware of the prohibition of appellate review of remand orders contained in 28 U.S.C. § 1447(d), and

cognizant also of the limiting construction of that prohibition found in Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336, 96 S.Ct. 584, 46 L.Ed.2d 542 (1976), we requested additional briefs from the parties addressing the jurisdictional issues underlying the district court's action. Having considered the issues carefully, we now hold that the remand order, although entered upon a ground specified in § 1447(c), is reviewable notwithstanding § 1447(d) because it was entered outside of the time frame specified in § 1447(c); and upon review of that remand order we determine that remand was improper. We therefore grant the application for a writ of mandamus.

II. Reviewability of the Remand Order

[1-3] In holding that all remand orders entered by federal district

courts are not insulated from review by § 1447(d), the Supreme Court in Thermtron emphasized that § 1447(d) must be construed with reference to § 1447(c). 423 U.S. at 345. The court said: "[O]nly remand orders issued under § 1447(c) and invoking the grounds specified therein - that removal was improvident and without jurisdiction - are immune from review under § 1447(d)." Id. at 346, 96 S.Ct. at 590. The remand order in this case was explicitly based on a § 1447(c) ground - lack of jurisdiction over the subject matter of the litigation. Section 1447(c) does not by its terms apply to all remand orders entered upon such a ground, however, but only to those entered "at any time before final judgment." Vacation of the final judgment of a federal court that was without jurisdiction to hear the case, and

a subsequent remand order, are not provided for in § 1447(c). Nevertheless, because federal courts are courts of limited jurisdiction, due regard for the constitutional allocation of powers between the state and federal systems requires a federal court scrupulously to confine itself to the jurisdiction conferred on it by Congress and permitted by the Constitution. Although § 1447(c) will govern remand in most cases, in those cases to which that section does not expressly apply the omission of coverage does not suffice to vest a federal court with a power it would not otherwise have. Even after entry of final judgment, the constitutional balance of policies that underlies the Article III grant of judicial power impels the vacation of that judgment and remand to the state court having jurisdiction when it is deter-

mined that the federal court was without power to act because of a lack of subject matter jurisdiction over a removed case. The action taken by the district court in this case, after it became aware that it had rendered a judgment when it was powerless to have done so, was precisely what the Supreme Court ordered done in American Fire & Casualty Co. v. Finn, 341 U.S. 6, 71 S.Ct. 534, 95 L.Ed. 702 (1951), when the Court determined that a federal court in this circuit had rendered judgment without federal subject matter jurisdiction of the removed case.[3]

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3 Neither party questions whether under § 1447 a district court has any power to remand after final judgment. Finn does not address the issue but impliedly holds that the court does have this power. Because we find this remand order to be improper, we will not rule on this broader point. We do note, however, that prior versions of the statute allowed remand "at any time." The addition of "before any

See also Tennessee v. Union & Planters' Bank, 152 U.S. 454, 14 S.Ct. 654, 38 L.Ed. 511 (1894).

Although the remand order in this case was not one explicitly covered by § 1447(c), it nevertheless arguably ought to be immune from appellate review because it was entered upon a ground specified in that section. In analyzing the scope of § 1447(d)'s prohibition of review of remand orders, the Court in Thermtron had occasion to deal only with a remand order prompted by the district court's congested docket, a consideration not found in

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final judgment" may reflect a congressional intent to restrict the district court's power to enter these orders. If such a rule is announced we would hope that a district court's post final judgment disposition of a removed case for lack of jurisdiction would be in a manner that allows the plaintiff to refile without facing a statute of limitations defense.

§ 1447(c). Although the Supreme Court discussed in broad terms the necessity of construing subsections (c) and (d) in pari materia, it does not necessarily follow from the holding in Thermtron that every departure from the literal prescriptions governing remand in § 1447(c) is sufficient to avoid the proscription of review contained in § 1447(d). Because Congress has so firmly stated a general policy against appellate review of remand orders, we deem it advisable to consider the end sought to be achieved by that policy and the effect on that end of a holding that remand orders entered after final judgment are reviewable.

The policy underlying § 1447 (d) identified by the court in Thermtron is the preclusion of delay in litigating the merits of a controversy that would attend appellate litigation of juris-

dictiona? issues. 423 U.S. at 351, 96 S.Ct. at 593. In speaking of one of the predecessors of § 1447(d)[4] that repealed an earlier provision[5] permitting review of remand orders in removed cases, the Court said:

> Congress... established the policy of not permitting interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed. United States v. Rice, 327 U.S. 742, 751, 66 S.Ct. 835, 90 L.Ed. 982 (1946).

The considerations of prompt and efficient judicial resolution of substantive controversies that inform a rule of nonreviewability of remand

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4 Act of March 3, 1887, c. 373, § 2, 24 Stat. 553.

5 Judiciary Act of 1875, c. 137, § 5, 18 Stat. 472.

orders issued before final judgment in a removed case do not apply with the same force to remand orders issued subsequent to entry of final judgment in a removed case. Whereas before final judgment the nonreviewability of remand orders serves to ensure the expeditious resolution of the case in a court of competent jurisdiction - the court in which the action was originally filed - and to minimize the expenditure of scarce federal judicial resources at the appellate level, once a case has been fully tried in a federal court and a final judgment entered, the equation alters markedly. The risk of an erroneous determination - which, of course, inheres in all human pursuits - is no greater after final judgment than before, and arguably is much less, since a district court may be expected punctiliously to assay claims of no juris-

diction before rendering an order that effectively reduces the value of its toil to naught. Deliberately subjecting the state court and the litigants to any risk of error without recourse to appellate review is a gamble, however, and the stakes in that gamble on the correctness of the district court's jurisdictional determination are much greater after a case has proceeded to judgment than before. Federal judicial resources, once expended upon the trial of a cause, obviously cannot be recouped by relitigation in a state court. An order of remand after entry of final judgment no longer fosters prompt resolution of the merits of the case, but serves instead only to delay final resolution by subjecting the litigants to a second, and the state court to a possibly duplicative, trial of the same matter. Extending the prohibition of

review in § 1447(d) to a remand order entered outside the time frame specified in § 1447(c) therefore promotes not at all the congressional policy that is the foundation of § 1447(d), and can only compound unnecessarily the undesirable consequences that ineluctably accompany any rule which makes a possible judicial error unreviewable.

[4,5] Our limitation of § 1447(d) to orders entered within the time frame specified in § 1447(c) is as consistent with judicial precedent as it is with congressional policy. We have already adverted to the Supreme Court's declaration, in holding that § 1447(d) applies solely to remand orders entered upon grounds specified in § 1447(c), that "only remand orders issued under § 1447(c) and invoking the grounds specified therein ... are immune from review under § 1447(d)." Thermtron,

423 U.S. at 346, 96 S.Ct. at 590 (emphasis added). Because issued after the entry of final judgment,[6] the remand order in this case was not, and could not have been, issued under the authority of § 1447(c), and therefore review of that order, by writ of mandamus,[7] is not precluded by § 1447(d). A remand order entered by a district court following entry of final judgment in a case is more closely akin to a remand of a removed case ordered by an appellate court than it is to a remand by the trial court before a final judgment has been rendered. Remands ordered by

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6 In arguing that the order is not reviewable, the International contends that its timely motions for judgment n. o. v. and new trial stayed the finality of the judgment. These motions are not included in the record before us. Nevertheless, we are of the opinion that considerations "staying" the time for filing an appeal because of pending motions are not relevant to when a judgment is "final" under § 1447(c). As

noted above, the congressional policy was to allow remand for a full trial. Because a full trial has occurred at the time motions for judgment n. o. v. and for new trial are filed, these policies are not thwarted by reviewing remand orders made after entry of final judgment but before decision on such motions. A rule such as the International proposes would only encourage unscrupulous litigants to cause the expenditure of federal judicial resources and then make their post trial motions after final judgment to raise the nonwaivable jurisdictional questions forcing remand only if the outcome is unfavorable. Litigants with valid arguments are not left remediless: questions of subject matter jurisdiction can be raised at any time, even on appeal. But after one full trial, and in this case two, a litigant cannot use the remand apparatus to force expenditure of their opponents' and the state courts' resources before review by an appellate court. Our decision in Live and Let Live, Inc. v. Carlsberg Mobile Home Properties, Ltd. - '73, 592 F.2d 846 (5th Cir. 1979) is not to the contrary. In that case the district court expressly made the entry of judgment on the verdict subject to decision on the unresolved diversity question, which had been raised before trial. As stated there, finality must be determined from the circumstances. Id. at 848. We find that the Carter judgment was final.

7 See Thermtron, 423 U.S. at 352-53, 96 S.Ct. at 593-94.

appellate courts returning removed cases to state courts have never been presumed to come within the bar of § 1447(d) or its predecessors.[8]

We therefore hold that an order of remand issued on whatever grounds by the district court after the entry of final judgment is reviewable in this court through a petition for a writ of mandamus. We now address the question whether remand was appropriate in this case.

III. Propriety of the Remand Order

[6,7] Although our notion of fair play is seriously offended when a party seeks removal of a case to a federal

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8 See Willingham v. Morgan, 395 U.S. 402, 404, 89 S.Ct. 1813, 1814, 23 L.Ed.2d 396 (1969); Aetna Cas. & Sur. Co. v. Flowers, 330 U.S. 464, 467, 67 S.Ct. 798, 800, 91 L.Ed. 1024 (1947); Gay v. Ruff, 292 U.S. 25, 30, 54 S.Ct. 608, 610, 78 L.Ed. 1099 (1934).

court, permits it to be tried and to proceed to judgment, and seeks a remand order only when the judgment turns out to be an unfavorable one, if the asserted ground for remand is the federal court's lack of subject matter jurisdiction, the concepts of equity, waiver, and estoppel are inapplicable. The subject matter jurisdiction of federal courts is limited by the Constitution and the Congress, and cannot be expanded by judicial interpretation or by the acts or consent of the parties to a case. American Fire & Casualty Co. v. Finn, 341 U.S. 6, 17-18, 71 S.Ct. 534, 541-542, 95 L.Ed. 702 (1951); Amco Construction Co. v. Mississippi State Building Comm'n, 602 F.2d 730, 733 (5th Cir. 1979).

[8] The district court noted in its remand order that the requirements for diversity jurisdiction were lacking

because Carter was a citizen of Georgia and the union, having members of Georgia citizenship, was deemed to be a citizen of that state under United Steelworkers of America v. R. H. Bouligny, Inc., 382 U.S. 145, 146-47, 86 S.Ct. 272, 273, 15 L.Ed.2d 217 (1967). Federal question jurisdiction therefore provides the only basis for removal of this case. The basic federal question statute is 28 U.S.C. § 1441(b), which provides:

> Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties.

For a case to "arise under" one of the stated sources of federal law, a right or immunity created by one of those

sources "must be an element, and an essential one, of the plaintiff's cause of action ...[That] right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another." Gully v. First Nat'l Bank in Meridian, 299 U.S. 109, 112, 57 S.Ct. 96, 97, 81 L.Ed. 70 (1936) (citations omitted). The federal controversy "must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal." Id. at 113, 57 S.Ct. at 98; see also Louisville & Nashville R.Co. v. Mottley, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908); Tennessee v. Union & Planters' Bank, 152 U.S. 454, 14 S.Ct. 654, 38 L.Ed.2d 511 (1894). On the other hand, the accepted rule in this circuit is that upon removal the removal court should

inspect the complaint carefully to determine whether a federal claim is necessarily presented, even if the plaintiff has couched his pleading exclusively in terms of state law. See Romick v. Bekins Van & Storage Co., 197 F.2d 369 (5th Cir. 1952). The reviewing court looks to the substance of the complaint, not the labels used in it. See Smith v. Local 25, Sheet Metal Workers Int'l Ass'n, 500 F.2d 741, 748-49 n.6 (5th Cir. 1974).

[9,10] In his order remanding the case, the district court stated, "At pre-trial, it clearly developed that the only claim plaintiff had was a state law claim for the intentional infliction of emotional distress by 'outrageous conduct'. See Farmer v. Carpenters, 430 U.S. 290, [97 S.Ct. 1056], 51 L.Ed.2d 338 (1977)." (emphasis in the original). The court

then concluded that because diversity of citizenship was absent, the court had no jurisdiction over this state law claim. The trial court erred by viewing the pleading in the wrong time frame. It is a fundamental principle of law that whether subject matter jurisdiction exists is a question answered by looking to the complaint as it existed at the time the petition for removal was filed. Pullman Co. v. Jenkins, 305 U.S. 534, 537-38, 59 S.Ct. 347, 348-49, 83 L.Ed. 334 (1939); Westmoreland Hospital Ass'n v. Blue Cross, 605 F.2d 119, 123 (3d Cir. 1979). When a subsequent narrowing of the issues excludes all federal claims, whether a pendant state claim should be remanded to state court is a question of judicial discretion, not of subject matter jurisdiction. Rosado v. Wyman, 397 U.S. 397, 403-05, 90 S.Ct. 1207, 1213-15, 25 L.Ed.2d 442 (1970); United Mine Workers

v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966); Hudak v. Economic Research Analysts, Inc., 499 F.2d 996, 1001 (5th Cir. 1974), cert. denied, 419 U.S. 1122, 95 S.Ct. 805, 42 L.Ed.2d 821 (1975); Webb v. Bladen, 480 F.2d 306, 309 (4th Cir. 1973). Indeed, it has often been stated that the plaintiff cannot rob the district court of subject matter jurisdiction by electing to amend away the grounds for federal jurisdiction. E.g., St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 58 S.Ct. 586, 82 L.Ed. 845 (1938). We therefore review first, whether a substantial federal question exists, and, if so, second, whether judicial discretion requires this remand in any event.

A. Federal Question Jurisdiction

The relevant portions of Carter's complaint follow:

2.

Beginning in January of 1972, the defendants [Sheet Metal Workers International Association and Local 85 of Sheet Metal Workers' International Association] conspired together, maliciously and willfully, to deprive the plaintiff of his employment in the Sheet Metal Industry and of his means of livelihood, to cause the plaintiff to be denied employment in this Industry, to deny the plaintiff his right and privilege to be a member of defendants' union, to impair the plaintiff's reputation among prospective employers, and to subject the plaintiff to embarrassment, scorn and derision among his friends, associates, relatives and fellow employees.

3.

In January of 1972, pursuant to, and in furtherance of, said conspiracy defendants' agents, officers and members, act-

ing for and under the specific instructions of all defendants herein, maliciously, and without probable cause therefor, used the threat of union coercion and pressure to cause the plaintiff to be denied employment of a job in his industry for which he was ready, willing and able to perform.

4.

In March of 1972, pursuant to this same scheme and conspiracy these individuals coerced and forced an employer of the plaintiff to dismiss the plaintiff from a job in his industry which he then presently held.

Carter's complaint clearly alleges tortious conduct under Georgia law, as was established in another appeal during this protracted litigation. Sheet Metal Workers Int'l Ass'n v. Carter, 133 Ga. App. 872, 212 S.E.2d 645 (1975), cert. denied, 423

U.S. 1078, 96 S.Ct. 866, 47 L.Ed.2d 89 (1976). The question is whether it also alleges actions within the jurisdiction of the federal courts.

The International's removal petition, filed June 14, 1978, discloses its initial position that the allegations of Carter's complaint sufficiently pleaded a federal claim, as to which removal would be proper. Specifically, the International asserted that Carter's allegations that he had been denied employment in the sheet metal industry through some conduct by the International, and that he had been denied a right to be a member of that union were claims arising under the Labor Management Reporting and Disclosure Act, 29 U.S.C. §§ 401, 402, and 411 and under the Labor Management Relations Act, 29 U.S.C. §§ 158, 159 or 29 U.S.C. § 185.

1. LMRDA. - The Labor Management Reporting and Disclosure Act of 1959 (LMRDA), also known as the Landrum-

Griffith Act, "contains a congressional finding that there have been breaches of trust and failures in the observance of high standards of responsibility in the labor and management fields. The Act was passed for the purposes declared including the elimination of improper practices." Clinton v. Hueston, 308 F.2d 908, 910 (5th Cir. 1962). The "bill of rights" of the LMRDA is found at 29 U.S.C. § 411 (1976). Presumably the International intended to rely on some provision in that section when, in its Petition for Removal, it said: "[T]he allegation of denial of membership falls squarely within the LMRDA, 29 U.S.C. § 401, § 402, § 411." These sections guarantee members equal rights to nominate candidates, to vote, to attend meetings, to meet with other members, to express views, and to institute court actions. The sections

also regulate the union's ability to increase dues, and to fine, suspend, expel, or "otherwise discipline" members.

[11,12] Whether Carter's allegations stated a claim under the LMRDA was a question without a clear answer at the time the petition for removal was filed. The LMRDA accords rights to every "member". That term is broader in scope than one might originally think in that Congress defined the term to include "any person who has fulfilled the requirements for membership in such organization." 29 U.S.C. § 402(o) (1976). In Hughes v. Local 11 of Int'l Ass'n of Bridge, Structural and Ornamental Ironworkers, 287 F.2d 810 (3d Cir.), cert. denied, 368 U.S. 829, 82 S.Ct. 51, 7 L.Ed.2d 32, the Third Circuit held that a dismissal for lack of subject matter jurisdiction was improper once the

plaintiff had alleged a substantial claim under the LMRDA. Whether the plaintiff actually was a "member" was a question of whether the complaint asserted a claim upon which relief could be granted, not a question of jurisdiction. Id. at 813-14. Several cases expressly or impliedly followed this lead. Gavin v. Structural Iron Workers Local No. 1, 553 F.2d 28 (7th Cir. 1977); Parish v. Legion, 450 F.2d 821 (9th Cir. 1971); Sheridan v. United Bhd. of Carpenters, 306 F.2d 152, 156 (3d Cir. 1962); Addison v. Grand Lodge of Int'l Ass'n of Machinists, 300 F.2d 863, 868 (9th Cir. 1962); Vincent v. Plumbers & Steamfitters Local No. 198, 384 F.Supp. 1379 (M.D. La. 1974); Axelrod v. Stoltz, 264 F.Supp. 536 (E.D. Pa. 1967), aff'd, 391 F.2d 549 (3d Cir. 1968); Cornelio v. Metropolitan

District Council of Philadelphia, 243 F.Supp. 126 (E.D. Pa. 1965), aff'd 358 F.2d 728 (3d Cir. 1966), cert. denied, 386 U.S. 975, 87 S.Ct. 1167, 18 L.Ed.2d 134 (1967); Ferger v. Local 483 of Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, 238 F.Supp. 1016 (D.N.J. 1964), aff'd, 342 F.2d 430 (3d Cir. 1965). See also Moynahan v. Pari-Mutuel Employees Guild of California, 317 F.2d 209, 211 n.3 (9th Cir.), cert. denied, 375 U.S. 911, 84 S.Ct. 207, 11 L.Ed.2d 150 (1963). This distinction is clearly correct. The district court has jurisdiction if a complaint states a substantial federal claim, and the court can then assess the legal sufficiency of the complaint. Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 105, 53 S.Ct. 549, 550, 77 L.Ed. 1062 (1933). A complaint's allegations are insubstantial if they are obviously without merit or if prior

decisions foreclose controversy on the subject. Id. at 105, 53 S.Ct. at 550. See also Romero v. International Terminal Operating Co., 358 U.S. 354, 359, 79 S.Ct. 468, 473, 3 L.Ed.2d 368 (1959); Montana-Dakota Utilities Co. v. North-Western Public Service Co., 341 U.S. 246, 249, 71 S.Ct. 692, 694, 95 L.Ed. 612 (1951); Bell v. Hood, 327 U.S. 678, 682, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946).

As indicated above, the claim under the LMRDA was not obviously meritless. Some courts had indicated, however, that the LMRDA does not countenance a claim for wrongful denial of membership. Abrams v. Carrier Corp., 434 F.2d 1234, 1254 (2d Cir. 1970), cert. denied, 401 U.S. 1009, 91 S.Ct. 1253, 28 L.Ed.2d 545 (1971). See also Gavin v. Structural Iron Workers Local No. 1, 553 F.2d 28 (7th Cir. 1977);

Moynahan v. Pari-Mutuel Employees Guild of California, 317 F.2d at 210; MacKenzie v. Local 624, Int'l Union of Operating Engineers, 472 F.Supp. 1025 (N.D. Miss. 1979); Vincent v. Plumbers & Steamfitters Local No. 198, 409 F.Supp. 206 (M.D. La. 1976). The cases distinguished situations such as in Hughes, in which plaintiffs who were members of the national and one local attempted to transfer to another. See Parish v. Legion, 450 F.2d at 824. In Hughes, the transferee local had not reserved the right to refuse membership. See also Gavin v. Structural Iron Workers, 553 F.2d at 30-31. If the local reserved that right, or required a vote for admittance, the plaintiff had not "fulfilled the requirements for membership," and was not a "member" eligible to sue under the LMRDA. See Moynahan v. Pari-Mutuel Employees, 317

F.2d at 210.

[13] Construing the complaint liberally, the allegations are sufficient to state a substantial federal claim under the LMRDA. The viability of an action for denial of membership was not such a settled question that the district court was deprived of subject matter jurisdiction, especially since the Supreme Court and this circuit have never ruled on the issue. Furthermore, the allegations in the complaint do not foreclose the possibility that Carter was attempting to transfer local membership or that the local had not reserved power to refuse membership.[9]

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9 Carter states in his Reply Memorandum that he actually was attempting to transfer membership from one local to another. This fact, however, is not clearly alleged in the complaint. But cf. Villarreal v. Brown Express, Inc., 529 F.2d 1219 (5th Cir. 1976) (in practice the courts consider the facts disclosed on the record as a whole).

In addition, the claim that the unions attempted to deny him employment in the industry arguably could be an allegation of improper disciplinary action. See Keene v. International Union of Operating Engineers, 569 F.2d 1375, 1379-81 (5th Cir. 1978) (blacklisting may be "other discipline" under 29 U.S.C. § 411(a)(5)). The district court had jurisdiction over the LMRDA claim. Whether relief could have been granted is a separate question which we need not, and therefore will not, decide at this time.

[14] 2. LMRA Section 301. - The federal district courts have jurisdiction over suits for violations of contracts between an employer and a labor organization under section 301(a) of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185(a) (1976). An employee can bring suit under section 301 against his union for breach of the

collective contract when the breach is related to breach of the union's duty of fair representation. Humphrey v. Moore, 375 U.S. 335, 84 S.Ct. 363, 11 L.Ed.2d 370 (1964). See Amalgamated Ass'n of Street, Electric Railway & Motor Coach Employees of America v. Lockridge, 403 U.S. 274, 299, 91 S.Ct. 1909, 1924, 29 L.Ed.2d 473 (1971); Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967).

[15,16] In its Petition for Removal, the International asserted: "One of the duties arising under section 301 is the Union's duty to fairly represent all employees coming under the protection of a collective bargaining agreement." Although the union does have this duty, a breach of the duty of fair representation is not always also a breach of the collective contract. See Smith v.

Local 25, Sheet Metal Workers Int'l Ass'n, 500 F.2d 741, 745-46 (5th Cir. 1974). The duty of fair representation is an independent statutory duty that arises from the union's position as exclusive bargaining agent under sections 8 and 9 of the labor laws. Ford Motor Co. v. Huffman, 345 U.S. 330, 337, 73 S.Ct. 681, 685, 97 L.Ed. 1048 (1953). When the allegations assert a breach of the duty of fair representation without a corresponding breach of the collective contract, federal jurisdiction cannot be grounded on section 301.

Carter's complaint nowhere mentions the collective bargaining agreement. While mindful that the courts should construe duty of fair representation complaints to guard against their dismissal, Czosek v. O'Mara, 397 U.S. 25, 27, 90 S.Ct. 770, 772, 25 L.Ed.2d 21 (1970), in the absence of any mention of the

collective bargaining contract we find it necessary to hold that there is no jurisdiction under section 301. Cf. Smith v. Local 25, Sheet Metal Workers Int'l Ass'n, 500 F.2d at 744, 745-46 (plaintiffs had not alleged violation of collective agreement; no section 301 suit based solely on duty of fair representation).

[17-19] 3. Sections 8 & 9. - A union has a duty to represent fairly all the employees in a bargaining unit because of the rights granted the union under sections 8(b) and 9(a) of the federal labor laws, 29 U.S.C. § 158(b), 159(a) (1976). Vaca v. Sipes, 386 U.S. at 177, 87 S.Ct. at 909; Smith v. Local 25, Sheet Metal Workers Int'l Ass'n, 500 F.2d at 746. These sections are part of an "Act of Congress regulating commerce" over which the district courts have original jurisdiction under

28 U.S.C. § 1337 (1976).[10] See Amalgamated Ass'n of Street, Electric Railway & Motor Coach Employees v. Lockridge, 403 U.S. at 274, 91 S.Ct. at 1909; Smith v. Local 25, Sheet Metal Workers Int'l Ass'n, 500 F.2d at 748-49. Unlike plaintiffs under section 301, Carter need not be a member of the union to assert a duty of fair representation claim; the union's duty extends to all those in the unit. A union breaches its duty if its conduct reflects hostile discrimination based on irrelevant and invidious considerations. Steele v. Louisville & Nashville R.R., 323 U.S. 192, 203, 65 S.Ct. 226, 232, 89 L.Ed.

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10 28 U.S.C. § 1337 (1976) provides:
The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

173 (1944). "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." Vaca v. Sipes, 386 U.S. at 190, 87 S.Ct. at 916 (1967).

[20] Carter's complaint clearly meets these standards. He alleges the unions discriminated against him without cause by maliciously conspiring to deprive him of employment, by maliciously causing him denial of employment in January of 1972, and by forcing an employer to dismiss him in March of 1972. The district court had federal question jurisdiction over the breach of the duty of fair representation claim.

B. Pendent Jurisdiction

[21,22] Because the district court had jurisdiction over at least

two federal questions in this suit, it also had the jurisdictional power to decide Carter's state law claims which arose from the same nucleus of operative fact. United Mine Workers v. Gibbs, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d (1966). Pendent jurisdiction is a doctrine of discretion: "Its justification lies in considerations of judicial economy, convenience and fairness to litigants ..." Id. at 726, 86 S.Ct. at 1139. Some of the factors to be considered are whether the federal claims were dismissed before trial, whether the state claims predominate, whether the state claims are closely tied to questions of federal policy, and whether the jury is likely to be confused by the treatment of divergent legal theories of relief. Id. at 726-27, 86 S.Ct. at 1139-40. Any

speculation that Gibbs required dismissal when all federal claims were eliminated before trial was soundly quieted in Rosado v. Wyman:

> We are not willing to defeat the common-sense policy of pendent jurisdiction - the conservation of judicial energy and the avoidance of multiplicity of litigation - by a conceptual approach that would require jurisdiction over the primary claim at all stages as a prerequisite to resolution of the pendent claim. The Court has shunned this view.

397 U.S. 397, 405, 90 S.Ct. 1207, 1214, 25 L.Ed.2d 442 (1970) (footnotes and citations omitted).

[23] A review of the factors influencing discretion reveals that while the district court could have dismissed the state claim, it would not

have been a clear abuse of discretion to refuse to do so after the final judgment. Certainly judicial economy would weigh against a third trial. Fairness to Carter, upon whom the International imposed federal jurisdiction, also militates for retention of pendent jurisdiction over the claim. Although the Court noted in Gibbs that it might even be appropriate to dismiss a pendent state claim after full trial, this case is not one in which the plaintiff was asking the federal court to tolerate a purely state claim. 383 U.S. at 727, 86 S.Ct. at 1139. The district court could have properly decided to retain pendent jurisdiction over the state law case. See Hudak v. Economic Research Analysts, Inc., 499 F.2d 996, 1001 (5th Cir. 1974). Because the district court reluctantly concluded it had no jurisdiction, however, it never

reached this question. We therefore return the case to the district court for consideration of whether, under all the surrounding circumstances, it should accept the state law claim under a discretionary exercise of pendent jurisdiction thus avoiding further duplicitous judicial efforts.

The writ is GRANTED. The case is returned to the district court with directions to VACATE the remand order, thereby allowing consideration of the pendent jurisdiction questions.